



"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The claimant's burden must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

"The phrase 'out of' the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises 'out of' employment if it arises out of the nature, conditions, obligations and incidents of the employment." Newman v. Bennett, 212 Kan. 562, Syl. 1 512 P.2d 497 (1973).

"The phrase 'in the course of' employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service." Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or more credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

Claimant alleges injury to his foot after having stepped on a nail on April 1, 1993. Respondent contends claimant was no longer employed by respondent at the time of the accident, having terminated his employment earlier.

The preponderance of the credible evidence indicates that the claimant, on the afternoon of April 1, 1993, was not in the employ of the respondent when he stepped on the nail. The Appeals Board finds claimant was on a personal errand, and while on respondent's property at the time of the injury, this incident did not occur "in the course of" employment as the claimant was not working in his employer's service at the time of the injury.

The Appeals Board further denies claimant's request to reopen this matter and remand to the Administrative Law Judge for the purpose of taking additional evidence. A review of the record indicates evidence sufficient to decide this matter was presented to the Administrative Law Judge. Should additional evidence surface, claimant would be free to request an additional preliminary hearing or proceed to regular hearing on this issue.

The Appeals Board further finds the respondent's request for costs against the claimant should be denied. K.S.A. 44-555 grants the Administrative Law Judge the power to assess all or part of the court reporter's fees to any party to the proceedings. The Appeals Board finds the decision of the Administrative Law Judge to assess costs against respondent is appropriate in this circumstance.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Alvin E. Witwer is affirmed in all respects and that claimant Dale L. Thornburgh shall be, and is, denied award against Timberlake Ranch and Mr. and Mrs. Dale Latham for alleged injuries occurring on or about April 1, 1993. Further, claimant's request that this matter be reopened and for a remand to the Administrative Law Judge is denied.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent to be paid as follows:

Appino & Biggs Reporting Service, Suite 102, 3625 S.W. 29th Street,  
Topeka, Kansas 66614 in the amount of \$899.16.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1995.

BOARD MEMBER \_\_\_\_\_

BOARD MEMBER \_\_\_\_\_

BOARD MEMBER \_\_\_\_\_

c: William J. Pauzauski, Topeka, KS  
Robert W. Green, Ottawa, KS  
Alvin E. Witwer, Administrative Law Judge  
Philip S. Harness, Director